80-689

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, *et al.*
Petitioners

vs.

CLARK VINCENT, *et al.*
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Is it a violation of the establishment clause of the First Amendment to the United States Constitution to allow a recognized student group to hold regular reoccurring religious worship services or to have religious teaching sessions in buildings of or on the grounds of a tax-supported public institution of higher education?

2. Does the free exercise clause of the First Amendment to the United States Constitution or the freedom of speech clause of the First Amendment to the United States Constitution take precedence over the establishment clause of the First Amendment to the United States Constitution?

3. Does the mandate of the state constitution of the State of Missouri requiring strict separation of church and state when it comes to the use of the facilities of a tax-supported public institution of higher education for regular religious worship services or religious teaching by a recognized student group, provide a sufficiently compelling interest to justify an interference with or infringement upon the free exercise rights under the First Amendment to the United States Constitution of the students?

4. Is the campus, including buildings, sidewalks and grounds, of a tax-supported public institution of higher education, a "public place" or "open forum" similar to public parklands, and, if so, does that fact require the tax-supported public institution of higher education to make its facilities available for the regular religious worship services of or religious teaching by a recognized student group?

PARTIES TO THE PROCEEDING IN THE EIGHTH CIRCUIT

Clark Vincent and Jonathan Williams were the plaintiff-appellants to the United States Court of Appeals for the Eighth Circuit.

Gary Widmar, The Board of Curators of the University of Missouri, Barbara Berkmeyer, Daniel L. Brenner, Robert A. Dempster, William T. Doak, C. R. Johnston, Marian Oldham, Wallace R. Stacey, Rex Z. Williams and Van O. Williams were the defendant-appellees in the United States Court of Appeals for the Eighth Circuit. (Mrs. Berkmeyer and Mr. Van O. Williams have been replaced as members of the Board of Curators by Mr. David Lewis and Mr. William Cocos).

Bible Study, a student organization at the University of Missouri-St. Louis; the Christian Legal Society of the University of Missouri at Kansas City; Cornerstone, a student organization at the University of Missouri-Kansas City; the International Society for Krishna Consciousness; and the Holy Spirit Association for the Unification of World Christianity filed Brief Amici Curiae with the Eighth Circuit Court of Appeals.

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No.

IN THE

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PETITION FOR A WRIT OF CERTIORARI
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not presently reported, but is set forth in the Appendix, *infra,* at A-1. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing or hearing by the Court en banc, including the dissent of Judges Bright and McMillian, entered on the 19th day of September, 1980, is set out in the Appendix, *infra,* at A-21. The order staying the mandate of the United States Court of Appeals for the Eighth Circuit, entered on the 30th day of September, 1980, is set out in the Appendix, *infra,* at A-25. The findings of the United States District Court for the Western District of Missouri is reported at 480 F. Supp. 907 (W.D. Mo. 1979) and is set out in the Appendix, *infra,* at A-26.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was filed on August 4, 1980. The petition for rehearing or hearing en banc was denied on September 19, 1980. The order staying the mandate was issued by the United States Court of Appeals for the Eighth Circuit on September 30, 1980. The jurisdiction of this honorable court rests on 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment to the United States Constitution. The First Amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceable to assemble, and to petition the government for a redress of grievances.

This case also involves the following provisions of the Constitution of the State of Missouri:

> That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same. Article I, Section 6, Constitution of the State of Missouri, 1945.
>
> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher,

minister or teacher thereof, as such and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship. Article I, Section 7, Constitution of the State of Missouri, 1945.

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or oter institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever. Article IX, Section 8, Constitution of the State of Missouri, 1945.

The following regulations from the Collected Rules and Regulations of the University of Missouri are also involved in this case:

No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. Studen congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for

religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to suc buldings as may be designated under provision of part .0106. Section 4.0314.0107 of the Collected Rules and Regulations of the University of Missouri.

Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group. Section 4.0314.0108 of the Collected Rules and Regulations of the University of Missouri.

STATEMENT OF THE CASE

On October 13, 1977, twelve students who were attending the University of Missouri-Kansas City, including the Respondents Clark Vincent and Jonathan Williams, filed a complaint in the United States District Court for the Western District of Missouri, Western Division, seeking injunctive relief and a declaratory judgment that certain regulations of the University of Missouri were unconstitutional and void. Your Petitioners, Dr. Gary E. Widmar, than Dean of Students at the University of Missouri-Kansas City; the University of Missouri; and the then individual members of the governing board of the University of Missouri were named as defendants. The students later sought permission to file an amended complaint and did so on or about July 18, 1978. The facts of the case were stipulated to by the parties in documents filed with the trial court and the matter was submitted to Judge William R. Collinson on cross-

motions for summary judgment. On December 11, 1979, Judge Collinson granted the motion for summary judgment of the defendants and denied the motion of the students, hereby upholding Section 4.0314.0107 and Section 4.0314.0108 of the regulations of the University of Missouri. The lower Court held that the students' complaint included allegations that they had been deprived, under color of state law, of rights and privileges guaranteed by the United States Constitution and that those allegations were a sufficient basis for the Court to exercise jurisdiction over the plaintiffs' claims under 28 U.S.C. Section 1343. see Appendix, *infra,* at A-37. Johnathan Williams and Clark Vincent subsequently filed their timely appeal of the District Court judgment with the Eighth Circuit Court of Appeals. The Eighth Circuit held that the University's regulation Section 4.0314.0107 was not required by the establishment clause of the First Amendment and was invalid because of the burden it placed upon the rights guaranteed to the students by the First and Fourteenth Amendments of the federal Constitution. see Appendix, *infra,* at A-20.

Clark Vincent and Jonathan Williams (hereinafter referred to as "Respondents") were involved in Cornerstone and participated in Cornerstone activities. see Appendix, *infra,* at A-27. Cornerstone was and is an officially recognized student organization on the campus of the University of Missouri-Kansas City, which is a part of the University of Missouri four-campus system governed by the Board of Curators, an official nine-person body established by the Constitution of the State of Missouri for the government of the University of Missouri. see Appendix, *infra,* at A-26—A-27. The avowed purpose of Cornerstone is to promote a knowledge and awareness of Jesus Christ on the campus, and, to encourage others in the faith and to grow in the grace and knowledge of the Lord Jesus Christ. see Appendix, *infra,* at A-32.

One of the benefits afforded recognized student organizations is the privilege of using the Student Center and certain

other facilities on the campus of the University of Missouri-Kansas City as a place to meet. see Appendix, *infra,* at A-27 . Each student enrolling at the University of Missouri-Kansas City pays a "Center Activities-Athletic Fee," the proceeds of which go, in part, to fund the operations of the student center. see Appendix, *supra,* at A-27. Although various religious groups, including Cornerstone, have been permitted to meet in the facilities of the University in the past, neither the Chancellor nor the Dean of Students of the University of Missouri-Kansas City ever authorized a student organization to utilize a University facility for a meeting where they had full knowledge that the purpose of the meeting included religious worship or religious teaching. see Appendix, *infra,* at A-31 . In early January, 1977, pursuant to established University procedures, Cornerstone sought permission to use Rooms 103 and 113 of the Haag Hall Annex, on a regular basis, for its Saturday night meetings. see Appendix, *infra,* at A-28. While the application for use stated that the purpose of the meeting would be to "promote a knowledge of Jesus Christ among students," the meetings were to be open to the general public. University officials sought clarification as to the activities to be conducted at the proposed meetings and were advised that typical Cornerstone meetings in University facilities usually included the following:

1. The offering of prayer;

2. The singing of hymns in praise and thanksgiving;

3. The public reading of scripture;

4. The sharing of personal views and experiences (in relation to God) by various persons;

5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and

6. An invitation to the interested to meet for a personal discussion.

The University was also advised by Cornerstone's attorney that worship was an important part of the general atmosphere of the meetings and that there was no doubt that the "undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting Jesus Christ both for salvation and for the power to live an abundant Christian life on earth." see Appendix, *infra,* at A-30. These facts were confirmed by the statements of one of the members of Cornerstone who indicated that the intended program for these meetings consisted of Bible study and teaching, prayer, informal sharing, and singing and that the purpose was to "attract the uninvolved so that the answers to life's ultimate questions rest with Jesus Christ and the Bible." see Appendix, *infra,* at A-33.

Cornerstone's application was rejected by the University on or about February 4, 1977, because it was concluded that the conduct of the proposed meeting would be in violation of University regulations 4.0314.0107 and 4.0314.0108. see Appendix, *infra,* at A-28. While Cornerstone was not permitted to hold meetings of the type described in their application of early January, 1977, it does remain an active officially recognized student organization on campus. see Appendix, *infra,* at A-31—A-32. The members thereof continued to practice their beliefs and continued to meet off-campus. see Appendix, *infra,* at A-31—A-35.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioners respectfully submit that this case, and the issues raised therein, is one of extreme importance dealing with difficult questions of law which should be reviewed and answered by this Court. This case, as finally decided, will affect and impact on every public college and university, not only in the Eighth Circuit, but in the United States. This case, as finally decided, will affect every student who attends or plans to attend a public college or university in this country. This case, as finally decided, will have an effect upon all tax-paying citizens of this country, whether or not they intend to send their children to a public college or university for an education. This case, as finally decided, is also of extreme interest and import to all organized churches and every religious group in this country, both those wishing to maintain and preserve the separation heretofore understood to be required by the establishment clause and those who would welcome any new opportunity to receive governmental support or assistance in their sectarian efforts.

There are several reasons why this particular case is of such importance and impact. First, it is a case of first impression in the federal Courts of Appeal. Secondly, the opinion of the three-judge panel of the Eighth Circuit is in opposition to the two federal district court opinions which had previously addressed the direct issue of religious worship services on the campus of a public college or university. *Chess* v. *Widmar,* 480 F. Supp. 907 (W.D.Mo. 1979) and *Dittman* v. *Western Washington University,* ____F. Supp. ____, Cause No. C79-1189V (W.D. Washington 1980) (now on appeal to the Ninth Circuit). See also *Pratt* v. *Arizona Board of Regents,* 110 Ariz. 466, 520 P.2d 514 (Banc 1974) and compare *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975), cert. denied

424 U.S. 934 (1976).[1] Third, the opinion of the three-judge panel of the Eighth Circuit Court of Appeals not only does not discuss or review what should be considered as pertinent and applicable Supreme Court "establishment clause" precedent, (cases from the education area such as *Abington School District* v. *Schempp,* 374 U.S. 203 (1963); *McCollum* v. *Bd. of Education,* 333 U.S. 203 (1948); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *Zorach* v. *Clauson,* 343 U.S. 306 (1952); *Committee for Public Education & Religious Freedom,* 413 U.S. 756 (1973); and *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971)) the panel appears to have ignored them completely in making its decision. Petitioners submit that this is the only conclusion which can be drawn since the conduct with the Eighth Circuit purports to allow here "...has been proscribed by the Supreme Court on numerous occasions." *Brandon* v. *Board of Education,* 487 F. Supp. 1219, 1229 (W.D.N.Y. 1980). Finally, and perhaps most importantly, the case, as it now stands, makes *substantial* inroads on the previously understood meaning of the establishment clause of the First Amendment to the United States Constitution. The opinion of the Eighth Circuit Court of Appeals now requires a public college and university to open up its buildings and grounds, supported and maintained by public tax monies, to *regular* religious worship services, to religious teaching, and to proselytizing and evangelism of students, and others rightfully on campus, by students. The opinion of the Eighth Circuit also is troubling because of its implications that religious worship is merely "religious speech" and because of

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[1]Judge Collinson's opinion illustrates why this opinion is not supportable by Supreme Court precedent. *Chess* v. *Widmar,* 480 F. Supp. 907, 916-917 (W.D. Mo. 1979), see Appendix, *infra* at A-42—A-44. Petitioners submit the case can also be distinguished by the following: There is no reference to any organized student group being involved; (2) the case dealt with an area in the students' living quarters; (3) there was no indication that the services were intended to be open to the public; and (4) there were apparently no prohibitions contained in the Constitution of the State of Delaware.

the unescapable suggestion of the opinion that the freedom of speech clause and/or the free exercise clause take precedent over the establishment clause. *Vincent* v. *Widmar,* Slip Opinion, pages 11-15, see Appendix, infra, at A-9—A-12. Petitioners submit that an erosion of the establishment clause of this magnitude must be reviewed and considered by the Supreme Court.

At the district court level, Judge Collinson held, *inter alia,* that the University's ban on religious services and worship, as implemented by its regulations, was required by the establishment clause of the First Amendment. *Chess* v. *Widmar,* 480 F. Supp. 907, 916 (W.D. Mo. 1979), see Appendix, *infra,* at A-42. However, the three-judge panel of the Eighth Circuit did not believe the use of the University's facilities for religious worship or religious teaching was an establishment of religion because it did not agree that such a policy would have the primary effect of advancing religion. *Vincent* v. *Widmar,* Slip Opinion, page 16, see Appendix, *infra,* at A-13. However, in so finding the Eighth Circuit ignored the Supreme Court's warning that aid will "...normally be thought to have a primary effect of advancing religion...when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). The Eighth Circuit has also ignored facts clearly indicating that the students involved in Cornerstone were seeking the imprimatur of the University, and therefore the State of Missouri, for advancement of its religious purposes. *Chess* v. *Widmar,* 480 F. Supp. 907 at 911-913. See Appendix, *infra,* at A-33—A-35. Petitioners contend that this is a vice which worried the framers of the Constitution and which the Establishment Clause was intended to prevent. *School District of Abington Township Pa.* v. *Schempp,* 374 U.S. 203, 228 (1963) (Douglas J., concurring). The Eighth Circuit did discuss *Tilton* v. *Richardson,* 430 U.S. 672 (1971), a case which the District Court found controlling, *Chess* v. *Widmar,* 480 F. Supp. 907, 915, see Appendix, *infra,* at A-41—A-42, and attempted to distinguish it. *Vincent* v. *Widmar,* Slip Opinion

pages 21-22, see Appendix, *infra,* at A-17—A-18. However, Petitioner would submit that the attempt at distinction is distorted and improper. Petitioners further submit that *Tilton* was concerned with more than the potential for "exclusive control" of a building by a certain college as expressed by the Eighth Circuit. Petitioners believe that the Supreme Court felt that if the building was used, in any way,

> "...to promote religious interests, the original federal grants will in part have the effect of advancing religion." *Tilton,* 430 U.S. at 683.

Petitioners respectfully submit that the three-judge panel has ignored the intent, content, and meaning of important Supreme Court decisions and the body of "establishment clause" law formed therein. The three-judge panel has also ignored the inevitable conclusion that under the law as set forth by the opinions of this honorable court, there is an impermissable advancement of religion in the case at bar.

Petitioners would further submit that the opinion of the three-judge panel also misinterprets or ignores the Constitution of the State of Missouri. The Missouri Constitution, and particularly Sections 6 and 7 of Article I, and Section 8 of Article IX, as set forth earlier, makes it quite clear that the people of Missouri intended a more restrictive provision than that contained in the establishment clause of the First Amendment to the federal Constitution. This is a fact *long* recognized by the Supreme Court of Missouri. *Paster* v. *Tussey,* 512 S.W.2d 97 (Mo. Banc. 1974), cert. denied, 419 U.S. 1111 (1975); *Harfst* v. *Hoegen,* 163 S.W.2d 609 (Mo. Banc. 1942); *Americans United* v. *Rogers,* 538 S.W.2d 711 (Mo. Banc. 1976), cert, denied, 429 U.S. 1029 (1976); and *Mallory* v. *Barrera,* 554 S.W.2d 556 (Mo. Banc. 1976). Furthermore, this intent of the Missouri Constitution has been accepted and approved by the federal judiciary, including this honorable Court. In *Luetkemeyer* v. *Kaufmann,* 364 F. Supp. 376 (W.D. Mo. 1973), affd. 419 U.S. 888 (1974), the Court said at page 386:

> We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a "compelling state interest in the regulation of a subject within the State's constitutional power[.]" * * * That interest, in our judgment, satisfies any possible infringement of the Free Exercise Clause of the First Amendment or of any other prohibition in the Constitution of the United States. * * *
>
> The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question. The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter.

Unfortunately, the three-judge panel makes reference to and "discusses" this extremely important aspect of the case only by way of a single footnote. *Vincent* v. *Widmar,* Slip Opinion, page 15, note 7, see Appendix, *infra,* at A-12. Petitioners believe that the dissenting opinion of Judges Bright and McMillian written in response to Petitioners' Motion for Rehearing or Hearing in Banc, successfully and succintly describes the three-judge panel's handling of this issue:

> In our judgment that footnote inadequately addresses this serious and important contention. The *text does not respond to this issue,* and the panel's rejection of this contention because of the lack of "concern" demonstrated by the University for separation of church and state *disregards the real issues*--whether the State Constitution mandates strict separation of church and state when it comes to use of University buildings for formalized or denominational

> worship services by a student group, and whether that mandate overrides any infringement of the students' free exercise rights under the United States Constitution. (Emphasis Supplied). Appendix, *infra,* at A-23.

The three-judge panel also indicated that the University campus is an open forum similar to the National Mall and other parkland. *Vincent* v. *Widmar,* Slip Opinion, pages 19-21, see Appendix, *infra,* at A-15—A-17. Petitioners submit this comparison is unjustified and improper. Petitioners contend that the campus of a state university is dedicated to one special function and that is education. *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927, 933 (N.D. Ill. 1968). The uses of students of their campus at their campus cannot compare to the magnitude of different peoples, ideas, purposes and events that occur at the National Mall or in the public parks of this country. (Nor can a college campus be reasonably compared to an airport or other public transportation terminal.) There should be no dispute that the National Mall, because of its strategic location, and past historical usage, has become an area not associated with or considered as owned by the U.S. government. It is an area where groups of any persuasion, and any group, fringe or legitimate, can go to hold an event, demonstrate, or "make a statement." Query, would the same be true of the U.S. Capitol Building? the Executive Office Building? the Treasury Building? the Supreme Court Building? It is doubtful that religious worship services of a regular reoccurring nature or on a infrequent basis would be approved in these buildings because they are so closely associated with the government. Likewise, there can be no disputing the association of the buildings of the University to the University itself and thereby the State of Missouri. Petitioners agree with Judges Bright and McMillian that there is

> "... considerable doubt that cases which permit expression of political and religious views in public places require that

> state institutions make its facilities available for denominational religious services." Appendix, *infra,* at A-24.

Even if these cases were somehow deemed applicable, Judge MacKennon's concurring opinion in *O'Hair* v. *Andrus,* 613 F.2d 931 (D.C. Cir. 1979) is enlightening. In that opinion, at page 938, he makes clear that

> "...authorizing special events of a religious nature on widely separated occasions in one thing so far as the establishment clause is concerned and *to do so on a regular basis is another thing.*" (Emphasis Supplied).

CONCLUSION

During oral argument of this case on May 21, 1980, at St. Paul, Minnesota, Senior Circuit Judge Floyd Gibson, a member of the three-judge panel, indicated that this matter would be a good case for the Supreme Court of the United States. Judge Bright and McMillian of the Eighth Circuit have characterized the case as raising "important issues" and "troubling questions." see Appendix, *infra,* at A-21;A-24. Petitioners can only whole-heartedly agree. The present decision in the Eighth Circuit, in Petitioners opinion, does not adequately address the issues raised, nor does the decision properly consider the previous decisions of this honorable Court. Petitioners believe that the questions presented in the petition for the granting of a writ of certiorari are extremely important ones for the public colleges and universities of the United States; for students; for taxpayers and parents; for churches and religious groups; and for the people of this country interested in maintaining our nation as envisioned by the wisdom of the Constitution. Petitioners would welcome the opportunity to more clearly address and brief, for the Court's benefit, the issues raised and therefore respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 4, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1048

Florian Frederick Chess, Dale Rhoton, Ronald Barnes, Glenn P. Garrison, Kathleen Anne Aguirre, Douglas Neef, Clark Vincent,
Appellant,

James S. Colmer, Jr., Dawn B. Wallace, Jonathan Williams,
Appellant,

Malinda Ann McMurry and Katherine Cyman,

v.

Gary E. Widmar, The Board of Curators of the University of Missouri, Barbara Berkmeyer, Daniel L. Brenner, Robert A. Dempster, William T. Doak, C. R. Johnston, Marian Oldham, Wallace R. Stacey, M.D., Rex Z. Williams and Van O. Williams,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: May 21, 1980
Filed: August 4, 1980

Before GIBSON, Senior Circuit Judge, and HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

This appeal presents the question of whether the University of Missouri-Kansas City, which permits recognized student organizations to use the student center, certain other buildings and the grounds of the University for political, cultural, educational, social and recreational events, may prohibit a recognized student group from using these same facilities for religious worship services or teaching. We hold it may not.

I

BACKGROUND

With the goal of making student free-time activity a cooperative aid to academic study,[1] the University of Missouri-Kansas City (UMKC) encourages the formation of student

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[1] The University bulletin describes the student activities program as follows:

> The student activities program is coordinated by the STUDENT ACTIVITIES OFFICE located in the University Center. Through various student organizations, boards and committees, cultural, social, educational and recreational programming is provided. The aim is to make student free time activity, a cooperative aid to academic study.
>
> In all its functions the student activities program encourages self-directed activity. This provides a great opportunity [for] self-realization and individual growth while participating in programming for the entire student population or for a special interest group. The overall goal is to develop social and cultural awareness as well as intellectual curiosity. Students plan events and programs in such a way that they learn while working and find enjoyment at the same time.
>
> In extracurricular affrairs, students govern themselves in accordance with the All Student Association (ASA) constitution. The legislative body is the Student Council, a representative group of students elected annually by the student body. The ASA recommends funding and acts as an advocate of student rights.

organizations, boards and committees. The University officially recognizes over ninety student organizations. The University's

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Activities provide an excellent opportunity for all students to meet and work with the administration and faculty, as well as local community groups. Social and fiscal responsibility and leadership in our democratic society [are] a prime requirement for the educated individual. Student activities [program] attempts to provide opportunity in these areas.

Most activities and the ASA offices are housed in the University Center which is dedicated to serving the social, co-curricular and cultural needs of UMKC. Student programs in the University Center often include lectures, symposia, concerts, discussions, receptions, chess and bridge tournaments, as well as many other special events sponsored by the ASA and its programming division, the University Program Council.

In a memorandum on UMKC's Student Activity Fee, Assistant Dean Paul Parker described two of the sponsored programs:

CAMPUS WIDE PROGRAMS—The Intramural Sports Program, Communiversity, the *University News*, the University Program Board, the Cultural and entertainment activities of the University Program Board and the Student Services Commission, all represent programs which have campus-wide appeal and interest. In general, these types of programs span the distance between school council programs and those of ethnic and/or special interest groups. Without this segment of student programming being active and creative, the campus' social, cultural, entertaining, and service needs would go unmet.

SPECIAL INTEREST GROUPS—Just as the University is responsive to the various educational needs of society, it must also be responsive to the various ethnic and non-academic special interest groups within the University. The University has officially recognized over 90 active student organizations, each with its specific area of interest. Ethnic organizations, such as Jewish College Students, United Mexican American Students, and The Afro-American Student Union, focus on the issues and concerns of their particular ethnic heritage. There are political organizations, such as Young Socialist Alliance, Women's Union, Young Democrats, and so forth. Also, there is a broad spectrum of nonethnic special interest groups such as the Fencing Club and Bridge and Chess Club, the Karate Club, Mortar Board, Omicron Delta Kappa, etc. These groups are formed by students to provide another dimension to the student's life on campus—the extra and co-curricular experience.

past and present policy is to permit recognized student groups to use the student center and certain other UMKC facilities for their lectures, discussions, symposiums, meetings, events and programs. Each student is required to pay a student activity fee of $41.00 per semester (1978-1979) to help defray the costs of these activities.

Appellant Cornerstone is, and for at least four years has been, an officially recognized student organization on the UMKC campus. It has a nucleus of about twenty active students and its on-campus meetings and events have been attended by up to 125 people.

From 1973 until 1977, Cornerstone sought and obtained permission to use University facilities for its weekly meetings and events. In 1977, however, this practice was terminated by the Unversity on the ground that Cornerstone's meetings violated regulations adopted by the Board of Curators in 1972. The full text of these regulations, which prohibit the use of University buildings or grounds for purposes of religious worship or religious teaching, is as follows:

> 4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. Student congregations of local churhes or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other con-

struction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106.

4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group.[2]

The University's enforcement of this regulation began with Cornerstone's January 5, 1977, request to continue its use of a particular lecture hall for Saturday night meetings during the spring term. On the University's request form, Cornerstone stated that its purpose was to "promote a knowledge of Jesus Christ among students" and listed the subject of the proposed meetings to be "various topics relating to Christianity and the Bible." The request stated that the meetings and events would be open to the public, no University funds would be used, no admission would be charged and no donations would be solicited. The Dean of Students met with Cornerstone representatives and requested more information regarding the nature and purpose of their meetings. In response, Cornerstone's attorney submitted a letter containing this direct and candid description:

> Typical Cornerstone meetings in University facilities usually include the following:
>
> 1. The offering of prayer;

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[2] We note that the parties have stipulated that there is no chapel on the UMKC campus.

2. The singing of hymns in praise and thanksgiving;

3. The public reading of scripture;

4. The sharing of personal views and experiences (in relation to God) by various persons;

5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and

6. An invitation to the interested to meet for a personal discussion.

As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.

Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere. There also is no doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth.

There are no collections or solicitations of funds at these meetings, and there are no specific rituals or practices of any particular denomination or sect.

Relying on this letter, the University concluded that Cornerstone's meetings would violate its regulations and denied the application on February 4, 1977. The University later refused the group's request to hold small group Bible studies on the University lawn.

In response to these refusals, eleven student members of Cornerstone initiated this action in federal district court, alleging

that the University had violated their rights under both the federal and state constitutions. They claimed, *inter alia*, that the University had deprived them of their rights to free exercise of their religion, freedom of speech and equal protection of the law. Named as defendants were the University's Board of Curators and the Dean of Students. At a pretrial conference, the parties agreed that the case could be submitted on stipulated facts. After the stipulation was filed, cross-motions for summary judgment were made.

On December 11, 1979, the district court granted the defendants' motion and denied the plaintiffs'. It characterized the issue as "whether the university's ban on religious activities in university-owned buildings is required by the establishment clause of the first amendment," *Chess* v. *Widmar*, 480 F. Supp. 907, 914 (W.D. Mo. 1979). Using the familiar establishment clause analysis,[3] the district court determined that a neutral policy accommodating all student groups in their use of the Unversity's facilities would clearly reflect a secular legislative purpose and would avoid excessive entaglement with religion. But, analogizing the facts before it to those faced by the Supreme Court in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the court found that "a university policy permitting regular religious services in university policy permitting regular religious services in university-owned buildings would have the primary effect of advancing religion." *Chess* v. *Widmar, supra*, 480 F. Supp. at 915-916. It concluded "that the university's present ban on religious services in its buildings is *required* by the establishment clause." *Id.* at 916 (emphasis added).

Notwithstanding this conclusion, the court then considered whether this ban ran afoul of rights guaranteed by other clauses, particularly the Free Exercise Clause. Initially, it found that no free exercise right was violated since it did not appear that the

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[3] *See infra*, p. 15.

"'practice' of holding religious services in a university-owned building is a matter of deep religious conviction to [these] plaintiffs." *Id.* at 917. Second, it concluded that the infringement, if any, of plaintiffs' free exercise rights was justified by a compelling state interest—Missouri's "long history of strict separation of church and state." *Id.* Finally, the court dismissed the argument that the Free Exercise Clause prevails if the Establishment and Free Exercise Clauses conflict, finding that the conflict is illusory because the two clauses are aimed at separate evils. *Id.* at 917-918.

The plaintiffs also argued that the University's regulations act as a prior restraint on their free speech rights. Characterizing this as an argument that the Establishment Clause is subordinate to the Free Speech Clause, the court rejected it, commenting that "speech with religious content cannot be treated the same as any other form of speech." *Id.* at 918. Citing to *Abington School District* v. *Schempp,* 374 U.S. 203, 219 (1963) (quoting Mr. Justice Rutledge's dissent in *Everson* v. *Board of Education,* 330 U.S. 1, 63 (1947)), the district court suggested that "secular intellectual liberties" were entitled to a higher degree of protection than "religious activity." *Chess* v. *Widmar, supra,* 480 F. Supp. at 918.

The court next rejected the plaintiffs' argument that the University had denied them equal protection of the laws. It distinguished *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953), on two grounds: First, unlike the situation in *Fowler,* in this case there is no discrimination among, as opposed to against, religious groups. Second, in this case, public buildings, as distiguished from a public park, are involved. *Chess* v. *Widmar, supra,* 480 F. Supp. at 919. The court acknowledge that "if the university's regulations were being applied to prohibit plaintiffs from conducting religious services on the grounds, sidewalks, or streets of the university, plaintiffs' equal protection argument would have some force," *id.,* but it did not discuss the stipulated facct that the University refused to permit Cor-

nerstone to hold Bible studies on the University's lawn. It omitted this incident from its analysis on the grounds that the complaint challenged "only the denial of the use of university-owned *buildings*." *Id.* (emphasis added).[4]

Finally, the court rejected plaintiffs' contention that the University's regulations were unconstitutionally vague and overbroad since the regulations' language closely tracked that approved in *Tilton*. *Id.* at 919-920.

II

ANALYSIS

We begin with the proposition that religious speech, like other speech, is protected by the First Amendment.[5] *See Fowler* v. *Rhode Island, supra; Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943). Similarly, the freedom to associate for the advancement of religious beliefs is no less protected than the freedom to associate for the advancement of beliefs that are political, economic or cultural in nature.

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of

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[4] We think this omission was clear error. Both the original and the first amended complaint refer to "university facilities," not just to University buildings, and this term is broad enough to include the University's grounds.

[5] The protection afforded religious speech is derived from the Free Exercise Clause, the Free Speech Clause, or both. *See Schaumburg* v. *Citizens for a Better Environment,* 63 L.Ed.2d 73, 82-83 (1980).

> the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

NAACP v. *Alabama,* 357 U.S. 449, 460-461 (1958) (emphasis added and citations omitted).

It is also fundamental that equal access to a public forum cannot be restricted because of the content of the message.

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Carey v. *Brown,* 48 U.S.L.W. 4756, 4758 (June 20, 1980) (No. 79-703) (quoting *Police Dept.* v. *Mosley,* 408 U.S. 92 (1972) (footnote omitted)); *see Fowler* v. *Rhode Island, supra; Niemotko* v. *Maryland,* 340 U.S. 268 (1951).

The principles stated—freedom of religious expression and equal access to a public forum—are significant here. The University has undertaken to aid in the growth and development of the "social and cultural awareness" of its students by

recognizing their self-directed activities and by permitting authorized groups to use the student center and other of its facilities for meetings, discussions, symposiums, programs and events. It has created an open forum for the activities of its recognized student groups. It has placed only one limitation on those activities: no religious worship or religious teaching may take place.

If the University's limitation applied to *all* religious speech, it would clearly be invalid. Absent a compelling state interest, the University does not have the rigt to deny a recognized student group access to its facilities solely on the basis of the content of the group's speech. *See Healy* v. *James,* 408 U.S. 169 (1972); *Gay Lib* v. *University of Missouri,* 558 F.2d 848 (8th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978); *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975), *cert. denied,* 424 U.S. 934 (1976).[6] The University concedes as much. It contends,

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[6] In *Healy* v. *James,* 408 U.S. 169 (1972), a student group seeking to organize an on-campus chapter of the Students for a Democratic Society was denied official recognition by a state college. Noting that the most important effect of the denial was the group's resulting inability to use the campus facilities for its meetings, *id.* at 176, the Court found the denial's effect was "a form of prior restraint" and that "a 'heavy burden' rests on the college to demonstrate the appropriateness of that action." *Id.* at 184.

In *Gay Lib* v. *University of Missouri,* 558 F.2d 848 (8th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978), this Court considered a similar denial of official recognition by the University of Missouri to a student group seeking "to provide a forum for discussion about homosexuality." *Id.* at 850. Noting, as did *Healy,* that the denial was a prior restraint on free speech, we found that "the restriction of First Amendment rights in [this] context may be justified only by a far greater showing of a likelihood of imminent lawless action than that presented * * *." *Id.* at 855.

In *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975), *cert. denied,* 424 U.S. 934 (1976), the court concluded that a state university's prohibition on religious worship services in campus facilities, as applied to religious groups seeking to use the common room of a dormitory, impeded the observance of religion and could only be justified by the showing of a compelling state interest for the regulation.

however, that its limited regulation permitting some religious speech, but prohibiting religious worship or religious teaching in its buildings or on its grounds, is constitutionally required to avoid an establishment of religion.[7] The district court accepted the University's argument. We cannot.

A framework for analyzing Establishment Clause problems was articulated in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613 (1971) (quoting *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970)), as follows:

> First, the [governmental regulation] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances not *inhibits religion* * * *; finally, the [regulation] must not foster "an excessive governmental entaglement with religion." (Emphasis added.)

The district court, in applying this analysis, recognized that "A [neutral] university policy that permitted *any* student group to meet in university-owned buildings for *any* purpose would aid all student groups, regardless of religious affiliation and would, therefore, reflect a clear secular purpose. In addition, since such a policy would make no distinction between groups or their purposes, entanglement with religion would be completely avoided." *Chess* v. *Widmar, supra,* 480 F. Supp. at 914

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[7] The University also contends that Missouri's long history of strict separation of church and state constitutes a compelling state interest that justifies burdening appellants' First and Fourteenth Amendment rights. *See Luetkemeyer* v. *Kaufmann,* 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd,* 419 U.S. 888 (1974). For the reasons stated in the text, we disagree. Moreover, it is difficult to believe that the University is as concerned with the strict separation of church and state as it here contends. The regulation at issue specifically states that the ban on the use of University facilities for religious worship or teaching is not to be interpreted "to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities." Regulation No. 4.0314.0107. This exception creates a greater danger of placing the University's imprimatur on religion than would granting Cornerstone's request for a meeting place.

(emphasis in original). It went on to hold, however, that a neutral policy would be impermissible because it would have the primary effect of advancing religion. *Accord, Dittman* v. *Western Washington University,* No. C79-1189V, slip op. at 4-5 (W.D. Wash., Feb. 27, 1980), *appeal docketed* No. 80-3120 (9th Cir., Apr. 7, 1980).

We agree with the district court that a neutral policy would have a secular purpose and would avoid an entanglement with religion. We cannot agree, however, that such a policy would have the primary effect of advancing religion. Rather, it would have the primary effect of advancing the University's admittedly secular purpose—to develop students' "social and cultural awareness as well as [their] intellectual curiosity." It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups, religious or secular. It would no more commit the University, its administration or its faculty to religious goals then they are now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, the Young Democrats or the Women's Union.

Furthermore, a neutral policy would not be an "establishment" as that term was understood by the framers of the First Amendment. "[F]or the men who wrote the Religion Clauses * * * the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission, supra,* 397 U.S. at 668. Under a neutral policy, the University would not sponsor religious worship or teaching; sponsorship would lie with the recognized student groups. Financial support would be minimal. Finally, there would be no active involvement of the sovereign because the University's role would be limited to

determining the time, place and manner of the event and would not extend to approval or disapproval of content.[8]

In contrast with a neutral policy, UMKC's current regulation has the primary effect of inhibiting religion, an effect which violates the Establishment Clause just as does governmental advancement of religion. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 612-613. The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups.[9]

The University's prohibition on worship and religious teaching also hopelessly entangles it in the delicate tasks of defining religion, determining whether a proposed event involves religious worship or teaching, and then monitoring events to ensure that no prohibited activity takes place. These would be particularly difficult tasks in our contemporary society.[10]

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[8] Student use of University facilities is, of course, subject to such reasonable limitations as to time, place and manner as the University may deem appropriate. *See Healy* v. *James, supra,* 408 U.S. at 192-193. "Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 189.

[9] In an affidavit filed with the district court, a Cornerstone member stated:

> Having to explain that we have to meet off campus tends to make students think that there is something "wrong" with us and that there is something wrong with religion since it has been banished from the campus. * * * This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group.

[10] Our society's broadening definition of religion is reflected in *Torcaso* v. *Watkins,* 367 U.S. 488, 495 & n.11 (1961), where the Court indicated that nontheistic religions, including Buddhism, Taoism, Ethical

The fine line between impermissible governmental aid to religion and the neutral accomodation of religious groups' First Amendment rights was illuminated by Judge Leventhal's scholarly opinion in *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979). In that case, the Court considered a challenge to the scheduled use of the National Mall for the celebration of Mass by Pope John Paul II. Although it was estimated that the Department of Interior would incur expenses in excess of $128,450 for services rendered during the Mass, no impermissible aid to religion was found. Noting that the Free Exercise Clause "compels government to make *some* accomodation to religious realities and needs," it found that "equal access to a public facility generally open to the public," was such an accomodation. *Id.* at 935 (emphasis in original, footnote deleted). It than concluded that "[s]o long as government aid goes not further than arguably required by [the accomodation] principle, there is no violation of the separation required by the Establishment Clause." *Id.* (footnote deleted). *See also Sherbert* v. *Verner*, 374 U.S. 398 (1963).

The University urges us to distinguish *O'Hair* on the ground that a public building rather than a park is involved. We cannot do so. We note initially that the University prohibited Cornerstone from meeting both in its buildings *and* on its grounds. The grounds of a university, no less than the parks of a town, have historically been used by students for the purposes of assembly and communication. Recognizing this, the district court noted that Cornerstone's equal protection argument would have some force if the group was prohibited "from conducting religious services on the grounds, sidewalks, or streets

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Culture and Secular Humanism, were included in the protection afforded by the Free Exercise Clause. Similarly, in *United States* v. *Seeger*, 380 U.S. 163, 166 (1965), the Court indicated that conscientious objector protection would extend to those whose nontheistic beliefs occupy a place in their lives parallel to that filled by an orthodox belief in God of one historically entitled to the exemption. *See also* L. Tribe, American Constitutional Law 826-833 (1978).

of the university * * *." *Chess* v. *Widmar, supra,* 480 F. Supp. at 919. It did not, however, apply this conclusion to the stipulated fact that Cornerstone was denied access to the University grounds. *See* p. 9 & note 3, *supra.* When this fact is considered, *O'Hair's* relevance is clear.

Moreover, even if UMKC's regulation prohibited only use of public buildings, *O'Hair* is still applicable. The important question is not the character of the property but the character of its use; the National Mall and other parkland has acquired its status as an open forum by tradition, the facilities that UMKC offers to its student groups have attained that status through operation of its Student Activities Program. Just as a sidewalk or a park may not be made available for some type of speech but not others, *see Police Dept.* v. *Mosley, supra; O'Hair* v. *Andrus, supra,* so, too, UMKC's facilities may not be made available to all student groups except those seeking to engage in religious worship or teaching.

We further note that a university, like parkland, connotes special First Amendment values. For millions of people, the university is their first and perhaps most important exposure to the free and open marketplace of ideas which is at the core of our First Amendment rights. *See Healy* v. *James, supra,* 408 U.S. at 180-181. In his classic essay, "The Idea of a University," John Henry Newman described the institution as a place

> in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth. It is a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error exposed, by the collision of mind with mind, and knowledge with knowledge.

Newman, *The Idea of a University,* in 28 The Harvard Classics 31, 39 (1910).

To attempt to insulate religious issues from this "collision of mind with mind, and knowledge with knowledge" is to deny the importance of religion in our history and culture and to deprecate the role of the university community in the maturation of youth.

The University also suggests that *O'Hair* is distinguishable because it involved a single use, not the regularly recurring use sought by Cornerstone. *See O'Hair* v. *Andrus, supra,* 613 F.2d at 639 (MacKinnon, J., concurring). The University's regulation, however, clearly prohibits any use, single or recurring.

The district court found, and the University asserts on appeal, that this case is controlled by *Tilton* v. *Richardson, supra,* 403 U.S. 672. In *Tilton,* the Court upheld aid in the form of federal grants for the construction of academic facilities at private universities. Some of these universities were church-related. The legislation included a restriction that the buildings not be used for "sectarian instruction or as a place for religious worship * * *." *Id.* at 675. The aid was upheld because its purpose was secular and its primary effect was not the advancement of religion.

The Court did, however, strike that portion of the legislation that terminated after twenty years the restriction on religious use of the facilities.

> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

Id. at 683.

The concern of the Court if *Tilton* was with the potential that a sectarian college would be granted exclusive control of a government-financed building on its campus and could devote that building to its own religious purposes. Here, however, there is no question that UMKC continues to control its buildings and devotes them to secular purposes. There is no *Tilton* problem simply because the use of a student forum provided by a university turns, from time to time, to religious activities as well as political, cultural and social ones. The neutral accommodation by a public university of students whose activities are religious is far different than the total dedication of government-funded buildings to a sectarian institution for sectarian purposes.

This case is also distinguishable from those that involved the requested use of classrooms for prayer or Bible study by high school student groups. *See, e.g., Brandon* v. *Board of Educ.*, 487 F. Supp. 1219 (N.D. N.Y. 1980); *Hunt* v. *Board of Educ.*, 321 F. Supp. 1263 (S.D. W.Va. 1971). First, high school students necessarily require more supervision than do young adults of college age and this supervision necessarily poses a greater risk of entangling governmental authority in religious issues. Teachers ordinarily assigned to assist and supervise high school student groups may be thrust into an untenable position when assigned to supervise a prayer group. Even their presence in the room may suggest governmental approval of the religious activities of the group. There is no evidence in the record before us, however, that Cornerstone or any other student group at UMKC receives supervision or assistance from any member of the University's faculty.

Second, we recognize that since university students often rely on their college campus as their total community, they can expect from it a greater accomodation of their religious needs than high school students can from their schools. One commentator has noted that

> the college or university should be viewed as a community, particularly in the case of the resident student who makes of the university his temporary home. Since much of his daily life is rooted in this community, there is greater reason for the public university to make certain specific accommodations of the student's religious interests than there is on the elementary and secondary school levels where the student lives at home. Considerations of both political and free exercise neutrality suggest that University officials should be able to extend official recognition to religious organizations, such as Newman and Hillel clubs, and make available to them campus facilities.

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablisment Principle,* 81 Harv. L. Rev. 513, 583 (1968).

III

CONCLUSION

UMKC has the right, as do all public universities, to recognize student groups that seek to associate for the advancement of any and all ideas. It has exercised this right and has opened certain of its facilities to recognized student groups for lectures, discussions, symposiums, meetings, events and programs. But UMKC has denied access to these facilities to one such recognized student group based solely on its conclusion that the group's meetings include either religious worship or religious teaching. This denial clearly burdens the constitutional rights of the group's members and is not justified by a compelling state interest in avoiding an establishment of religion. A neutral accomodation of the many student groups active at UMKC would not constitute an establishment of religion even though some student groups may use the University's facilities for religious worship or religious teaching. Therefore, UMKC's regulation No. 4.0314.0107, which prohibits religious worship and

religious teaching in the University's buildings or on its grounds, is not required by the Establishment Clause. Because of the burden it imposes on the rights guaranteed to the appellants by the First and Fourteenth Amendments of the federal Constitution, the regulation is invalid.

This matter is remanded to the district court for action consistent with this opinion. Costs will be taxed to the appellees. The appellants may file their request for attorneys' fees on this appeal with this Court within ten days of the issuance of the mandate. The appellees will then have ten days to make a response.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1048
September Term, 1980

Florian Frederick Chess, et al.
Clark Vincent, et al.,
Appellants,

v.

Gary E. Widmar, et al.,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

The petition for rehearing en banc is denied. Judges Bright and McMillian would grant the motion and have filed a dissenting statement, copy of which is attached to this order and by reference made a part hereof.

September 19, 1980

BRIGHT and McMILLIAN, Circuit Judges, dissenting.

We dissent from the ruling of the majority denying a rehearing en banc in this case. The case and the important issues it raises deserve the full attention of this court.

The University's petition for a rehearing en banc alleges in part that the panel opinion either misinterpreted or ignored the constitution and laws of the State of Missouri. Article I, § 7 of the Missouri Constitution explicitly requires

> [t]hat no money shall ever be taken from the public treasury, *directly or indirectly,* in aid of any church, sect or denomination of religion * * *. (Emphasis added)

Additionally, Article IX, § 8 clearly states:

> Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation *or pay from any public fund whatever, anything* in aid of any religious creed, church or sectarian purpose * * *. (Emphasis added)

The Missouri courts have long interpreted these provisions to be more restrictive than the first amendment to the United States Constitution in prohibiting expenditures of public funds in a manner tending to erode an absolute separation of church and state. *American United* v. *Rogers,* 538 S.W.2d 711, 720, *cert. denied,* 429 U.S. 1029 (1976); *Paster* v. *Tussey,* 512 S.W.2d 97, 101-02 (Mo. 1974) (en banc), *cert. denied,* 419 U.S. 1111 (1975); *Harfst* v. *Hogen,* 163 S.W.2d 609, 613-14 (Mo. 1947) (en banc).

Significantly, this interpretation has received the approval of the federal judiciary in this circuit. As stated in *Luetkemeyer, et al.* v. *Kaufmann, et al.,* 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd,* 419 U.S. 888 (1974):

> We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a "compelling state interest in the regulation of a subject within the State's constitutional power [.]" * * * That interest, in our judgment, satisfies any possible infringement of the Free Exercise Clause of the First Amendment or of any other prohibition in the Constitution of the United States. * * *
>
> The fact that Missouri has determined to enforce a more strict policy of church and state separation than that re-

> quired by the First Amendment does not present any substantial federal constitutional question. The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter. [*Id.* at 386.]

The panel decision, however, only cryptically refers to the role of state law in this case, and even then only by way of footnote.

> The University also contends that Missouri's long history of strict separation of church and state constitutes a compelling state interest that justifies burdening appellants' First and Fourteenth Amendment rights. *See Luetkemeyer v. Kaufmann,* 364 F. Supp. 376 (W.D. Mo. 973), *aff'd,* 419 U.S. 888 (1974). For the reasons stated in the test, we disagree. Moreover, it is difficult to believe that the University is as concerned with the strict separation of church and state as it here contends. * * * [*Chess, et al.* v. *Widmar, et al.*, No. 80-1048, slip op. at 15 n. 7 (8th Cir. Aug. 4, 1980).]

In our judgment that footnote inadequately addresses this serious and important contention. The test does not respond to the issue, and the panel's rejection of this contention because of the lack of "concern" demonstrated by the University for separation of church and state disregards the real issues—whether the state constitution mandates strict separation of church and state when it comes to use of University buildings for formalized or denominational worship services by a student group, and whether that mandate overrides any infringement of the students' free exercise rights under the United States Constitution.

Moreover, the case raises significant issues under the first amendment religion clauses that we believe ought to be addressed by the full court, particularly because the case appears to be

one of first impression in this ciruict. The brevity of the first amendment and the absolute terms in which it is cast have provided the courts with a continuing source of difficulty in steering a course between the Scylla and Charybdis of the establishment and free exercise clauses.

We entertain considerable doubt that cases which permit expression of political and religious views in public places require that state institutions make its facilities available for denominational religious services.

These troubling questions, in our judgment, warrant a rehearing en banc.

A true copy:

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1048
September Term, 1980

Florian Frederick Chess, Dale Rhoton, Ronald Barnes, Glenn P. Garrison, Kathleen Anne Aguirre, Douglas Neef, Clark Vincent, Appellant,

James S. Colmer, Jr. Dawn Wallace, Jonathan Williams, Appellant,

Malinda Ann McMurry and Katherine Cyman,

v.

Gary E. Widmar, The Board of Curators of the University of Missouri, Barbara Berkmeyer, Daniel L. Brenner, Robert A. Dempster, William T. Doak, C. R. Johnston, Marian Oldham, Wallace R. Stacey, M. D. Rex Z. Williams and Van O. Williams,

Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

On motion of appellees, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of the Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of ceriorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

September 30, 1980

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0756-W-2

Florian Frederick Chess, et al.,
Plaintiffs,

v.

Gary E. Widmar, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

This action was filed on October 13, 1977 by eleven students at the University of Missouri-Kansas City (hereinafter university). The eleven students are part of a religious group called Cornerstone, which is an officially recognized student group at the university. The students' complaint alleges that university officials have refused to allow the students involved in Cornerstone to conduct their regular religious services in university-owned buildings. The students contend that the university's refusal to permit their group to use university facilities violates their rights guaranteed by the first and fourteenth amendments to the United States Constitution. On July 18, 1978, the students filed an amended complaint in which they request both a declaratory judgment and injunctive relief.

The parties have filed cross-motions for summary judgment and have stipulated that the following facts are not in dispute.

1. Cornerstone is an officially recognized student organization at the campus of the University of Missouri - Kansas City (UMKC). UMKC is a part of the University of Missouri system which is governed by the Board of Curators of the University of

Missouri, which is an official body established by the state constitution of Missouri for the government of the University and its affairs.

2. The individuals named as plaintiffs were enrolled as students at UMKC at the time this action was commenced and were involved in Cornerstone. Plaintiffs Garrison, Aguirre, Colmer and Cyman are not presently enrolled as students at UMKC. The balance of the named plaintiffs are still presently enrolled at UMKC, and still participate in Cornerstone activities.

3. Under past and current policy of the University of Missouri, one of the benefits afforded recognized student organizations is the privilege of using the student center and certain other facilities of the University as a place in which to meet, subject to certain limitations as to time, place and conduct of the proposed meeting.

4. Each student enrolling at the University of Missouri - Kansas City pays a "Center Activities - Athletic Fee." This fee is $35.00 for all those enrolling for at least ten credit hours of instruction, and is something less for those taking fewer hours of instruction. The proceeds from the "Center Activities - Athletic Fee" go, in part, to fund the operation of the student center (referred to at many schools as a student union).

5. The following regulations are presently in effect at UMKC and throughout all campuses of the University and have been in effect since sometime in 1972:

> 4.0314.0107 No university buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly

referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106.

4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group.

6. In early January, 1977, pursuant to established University procedures, Cornerstone applied for the privilege of using the University facilities, on a regular basis, for holding Cornerstone meetings.

7. Said application of Cornerstone was rejected on or about February 4, 1977, because the University, after asking for clarification as to the activities to be conducted at the proposed meetings, concluded that the conduct of the proposed meetings would be in violation of regulations 4.0314.0107 and 4.0314.0108. In reaching such conclusions, the University relied primarily on the letter of one of plaintiffs' attorneys, which was written on behalf of Cornerstone to Mr. Gary E. Widmar, Dean of Students, UMKC. The letter states:

Re: Request of Cornerstone for
use of University Facilities

Dear Dean Widmar:

Thank you for meeting with my clients and me on January 20. You will recall that at that time we briefly discussed the request of Cornerstone for the use of university facilities, and I advised you that I would be submitting a legal memorandum supporting our view that the law prohibits the discriminatory banning of religious activities from university property.

Since you mentioned that you had been consulting with Mr. Marvin Wright of the University Counsel's office in regard to this question, I decided that I would address the legal memorandum to Mr. Wright and furnish you with a copy. But I also wish to take this opportunity to respond to your request for more information regarding the nature and purpose of the Cornerstone meetings.

Typical Cornerstone meetings in University facilities usually include the following:

1. The offering of prayer;

2. The singing of hymns in praise and thanksgiving;

3. The public reading of scripture;

4. The sharing of personal views and experiences (in relation to God) by various persons;

5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and

6. An invitation to the interested to meet for a personal discussion.

As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.

Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is not doubt that worship is an important part of the general atmosphere. There also is not doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth.

There are no collections or solicitations of funds at these meetings, and there are no specific rituals or practices of any particular denomination or sect.

I assume that the foregoing information will be sufficient. If more is needed, please let me know and we will be happy to provide it for you. In the meantime, I am herewith resubmitting in behalf of Cornerstone the group's request for the use of University facilities.

In view of the recent Delaware decision enclosed with my letter to Mr. Wright, I do not feel the University could be criticized for allowing Cornerstone to continue to meet pending further clarification of the law. And I must point out that it is very important to my clients that they be able to continue to use University facilities, particularly in view of some special meetings planned during mid-February.

Thank you for your consideration.

Very truly yours,

James M. Smart, Jr.

8. As a result of said rejection of the application of Cornerstone to use University facilities, Cornerstone has not been permitted to use the University facilities as a place in which to hold meetings of the type described in their application since the date of the rejection of said application. In addition, Cornerstone has not been permitted to hold small group Bible studies on the University lawn or in other University facilities.

9. Although various religious groups, including Cornerstone, have been permitted to meet in the facilities of the University in the past, neither the Chancellor nor the Dean of Students of the University of Missouri - Kansas City have ever authorized a student organization to utilize a University facitity for a meeting where they had full knowledge that the purposes of the meeting include religious worship or religious teaching.

10. The University has only one physical facility designated as a chapel and it is located on the Columbia campus of the University and was built and paid for totally by private donations and funds.

11. If Florian Frederick Chess were summoned to testify of his personal knowledge as to matters pertinent to the issues of this case, his testimony would be the same as the content of his affidavit dated September 29, 1977, and filed with the Motion for Preliminary Injunction in this case. In that affidavit, Mr. Chess states:

> 1. I am a student at the University of Missouri—Kansas City and I reside at 4914 Grand Avenue, Apartment 12, Kansas City, Missouri 64112. My telephone number is 753-5185.
>
> 2. I am involved in a recognized student group on the UMKC campus called Cornerstone.
>
> 3. For the last year or two we have had at any one time perhaps twenty students who participate actively in Cornerstone and form the backbone of the campus organiza-

tion. There are many other students who come to meetings and get-togethers of our group less frequently, but still on a somewhat regular basis. Students can be involved as much or as little as they desire. We do not have memberships or dues and we have very little formal organization. We have, however, in the past been one of the most, if not the most, active organization on campus.

4. We are a group of people who believe that Christianity is pertinent to everyday life — even the life of a student. We find our Christianity — which we would define as a personal relationship with a resurrected, living Savior — to be relevant to all aspects of our lives. For instance, when we make value decisions as to how we relate to people, whether or not we should be honest in taking examinations, what our attitudes should be towards sex and marriage, how we should respond to our parents and to others in authority, what we should pursue for a career — and in all of such matters, we find that our Christianity has something to say and is therefore intensely practical. We are not a denomination and we are not concerned with religious ritual and religious ceremony, but instead with the practical aspects of how Christianity and the Bible relate to every aspect of our lives.

5. Our purpose as a group is to promote a knowledge and awareness of Jesus Christ on the campus, and also, of course, to encourage one another in the faith and to grow in the grace and knowledge of the Lord Jesus Christ. To carry out these objectives we must meet together, provide a forum for our message, and have a place for interested students to meet with us.

6. We have been meeting regularly on the campus since about 1972 or 1973. We have met at different locations on campus, always with permission. Last year we met regularly at 103 Haig Hall Annex for our Saturday night meetings.

We have had up to one hundred and twenty-five people at the meetings on several occasions, and frequently have had at least one hundred.

7. We also in the past have had some Bible studies on campus with permission. During the 1975 - 1976 year we had a weekly study in Room 34 of the Education Building.

8. The program for our Saturday night meetings on campus consisted of Bible study and teaching, prayer informal sharing, and singing. All are welcome to attend, and, in fact, it is our purpose to attract the uninvolved so that they too might assure themselves that the answers to life's ultimate questions rest with Jesus Christ and the Bible.

9. We have never had nor sought any official promotion or sanction as to our activities or purposes from the university administration, and we expect no more accommodation than that which is afforded other recognized student groups.

10. The prohibition against meeting on campus which began in February, 1977, has had a very significant impact on our meetings, on our attendance, and on our ability to maintain the momentum of our outreach to students and faculty.

11. We have continued to meet, of course, but being off campus has had many unfortunate disadvantages:

a) One disadvantage is a loss of visibility and identity as a campus organization. In a real sense, we are no longer a "campus" organization, and it is difficult to interest other students in any activities which are off campus. Students know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting.

b) Another disadvantage is increased confusion. Even though we have begun meeting in a house located only about a block and a half from the campus, students who are not familiar with where we are meeting are not as likely to go to an unfamiliar address on a residential street (Charlotte Street) as they would be to go to a regularly used and well-known campus building.

c) Another disadvantage is descreased comfort. Interested visitors are not encouraged to return by the crowded and uncomfortable conditions that exist at the meetings on Charlotte Street. Not only is the house severly overcrowded, but the house is so constructed that probably no more than about forty percent of those in attendance can see the person speaking even when the speaker stands in the most observable position.

d) Another disadvantage is lack of convenience and efficiency. It is just not as convenient for students to go off campus as it takes more time out of their schedules.

e) Another disadvantage is the burden that it places upon those who host the meetings. We have been having roughly seventy-five people at our regular off-campus meetings.

f) Another disadvantage is that it makes our message and our purposes seem more remote and less relevant to the typical student. Having to explain that we have to meet off campus tends to make students think that there is something "wrong" with us and that there is something wrong with religion since it has been banished from the campus. This leads to the kind of thinking which holds that religion is obsolete

and has nothing to do with the realities of life. This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group.

g) In addition, and also as a result of the above stated factors, we have experienced a definite decrease in the attendance at our activities. We have continued to promote our activities and have continued our efforts to attract other studnets, but our attendance has been lower since we were forced off campus. We seem to have an average attendance of roughly seventy-five or so at our recent meetings since being forced off campus, and it would be physically impossible for us to accommodate many more than now attend. It would be impossible, for instance, to accommodate the one hundred and twenty-five we used to have at some of our campus meetings on previous occasions when we were permitted to meet on campus.

/s/ Florian Frederick Chess
Florian Frederick Chess

12. If Jonathan Williams were summoned to testify of his own personal knowledge as to matters pertinent to the issues of this case, his testimony would be the same as the content of his affidavit dated September 29, 1977, and filed with the Motion for Preliminary Injunction in this case. In that affidavit Mr. Williams states:

1. I am a student at the University of Missouri—Kansas City and I reside at 5532A Troost, Kansas City, Missouri. My telephone number is 444-6679. I am involved in the Cornerstone organiation.

2. Our group has been prohibited from holding our regular meetings in university buildings since last February.

3. On about August 29, 1977, Tony Hallman, a friend of mine who is also involved in Cornerstone, and I went together to the University Buildings and Grounds office to see if it would be possible to have an informal Bible study for a small group of people (approximately twenty or so) on the lawn on the grounds of the university. We talked with Mr. Hatch, the Chief of Buildings and Grounds.

4. After describing to Mr. Hatch why we had come, Mr. Hatch showed us the university regulation which prohibited the use of the university premises for "religious teaching" and "religious worship." Mr. Hatch then asked what we would do at these meetings, and I told him that we would read our Bibles and talk about things in the Bible. Mr. Hatch advised us that, in his view, the only way that we could be permitted to meet was if we presented all possible views of the Bible fairly, and not talk about just one view of the Bible. Although Mr. Hatch was pleasant and sympathetic, he was firm in his position. Mr. Hatch never inquired about the size of the group, nor did he give any other reason as to why we would not be permitted to meet on the grounds.

5. Since the regulation Mr. Hatch had cited mentioned that we could meet in a chapel if there was one, I inquired about the possibility that a chapel would be built. Mr. Hatch stated that if we wanted a chapel, we would have to "get the ball rolling" ourselves and that it would have to be funded by private donations.

6. Mr. Hatch then referred us to Mr. Claiborne Harper, Business Officer in the university administration, who we went to see that same day. We ended up seeing a Mr. Stan Dalen, Assistant Business Officer, instead. He in turn called Dean Gary Widmar, Dean of Students. Mr. Dalen then said that Dean Widmar suggested that we talk to Dr. Paul Parker, an administrator in charge of "Student Life."

7. We went to see Dr. Parker and explained to him why we had come. Dr. Parker stated that he could not give us permission to meet because of the university's policy about religious meetings, and he stated that he was surprised that Dean Widmar had suggested that we come to see him. He stated that, "until this thing is cleared up, I cannot approve your request."

8. I have also read the affidavit of Florian Frederick Chess dated *Sept. 29, 1977* in regard to the impact of the prohibition on our campus ministry, and I find the things stated therein to be true and correct to the best of my knowledge and belief.

/s/ Jonathan Williams
Jonathan Williams

Plaintiffs' complaint includes allegations that they have been deprived, under color of state law, of rights and privileges guaranteed by the United States Constitution. Those allegations are a sufficient basis for this Court to exercise jurisdiction over plaintiffs' claim. 28 U.S.C. § 1343 (1976). The parties have not addressed the questions whether these plaintiffs have standing to bring this action and whether the action is moot. This Court has however, carefully considered those issues and finds that the action is in a proper posture for decision.

This cause now pends on the parties' cross-motions for summary judgment. After consideration of the parties' stipulations and their suggestions in support of their motions for summary judgment, this Court is convinced that the material facts are not in dispute and that summary judgment is, therefore, appropriate.

The sole university practice challenged in this action is the refusal, by the university, to permit plaintiffs to conduct regular religious services in university-owned buildings. Plaintiffs do not contend that they are treated differently from any other

religious group on campus. Nor do plaintiffs contend that they are limited, in any way, from holding on-campus meetings that do *not* include religious worship services.

Plaintiffs present several arguments in support of their contention that the university's refusal to permit Cornerstone to hold religious worship services in university-owned buildings is constitutionally impermissible. First, plaintiffs argue that the university's policy violates their right to free exercise of their religion as guaranteed by the first and fourteenth amendments. The first amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

U.S. Const. amend. I. Both the establishment clause and the free exercise clause of the first amendment have been made applicable to the States through the fourteenth amendment. *Cantwell* v. *Connecticut,* 310 U.S. 296, 303 (1940). There is no dispute that the actions of the university, for the purposes of this lawsuit, may be treated as actions of the State of Missouri. The university's actions are, thus, subject to the limitations of the first amendment as applied to the States through the fourteenth amendment.

This Court understands plaintiffs' free exercise argument to be that the university's ban on religious services in university-owned buildings infringes their right to practice their religion on the university campus. In response, defendants argue that the university's ban on religious activities in university-owned buildings is required by the establishment clause of the first amendment. Defendants also argue, alternatively, that the State of Missouri's interest in maintaining a strict separation of church and state is a sufficiently compelling interest to justify whatever infringement, if any, of plaintiffs' free exercise rights that may result from the ban on religious activities in university-owned buildings.

The starting point for this Court's analysis is the question whether the university's ban on religious activities in university-owned buildings is required by the establishment clause of the first amendment. That question is not easily answered. As Chief Justice Burger has observed, "candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudicaton." *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971). The Supreme Court has, however, provided some guidance in this difficult area. The Supreme Court's establishment clause cases, taken together, make clear that three factors should be considered in determining whether a certain regulation or practice violates the establishment clause:

> [T]he law in question, first must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive government entanglement with religion.

Committee for Public Education v. *Nyquist,* 413 U.S. 756, 773 (1973) (citations omitted); *Bogen* v. *Doty,* 598 F.2d 1110, 1113 (8th Cir. 1979). In applying those factors to the facts of this case, this Court finds that the first and third factors do not operate to bar the request for use of the university's buildings. A university policy that permitted *any* student group to meet in university-owned buildings for *any* purpose would aid all student groups, regardless of religious affiliation and would, therefore, reflect a clear secular purpose. In addition, since such a policy would make no distinction between groups or their purposes, entanglement with religion would be completely avoided. The second factor, whether the primary effect either advances or inhibits religion, is, however, not so easily answered. This Court draws guidance from the Supreme Court's analysis of this factor in its establishment clause cases.

The answer to the question of whether a policy that permitted the conduct of religious services in government-owned buildings

would have the effect of advancing religion was first suggested by Justice Brennan in *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963). In his concurring opinion, Justice Brennan stated:

> The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the *temporary* use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood.

374 U.S. at 299 (concurring opinion) (emphasis added). Justice Brennan also noted, however, that "A different problem may be presented with respect to the *regular* use of public school property for religious activities." *Id.* at 298 n. 74 (emphasis added). The outcome suggested by Justice Brennan in *Abington School Dist., supra,* was adopted by the Court seven years later in *Tilton* v. *Richardson,* 403 U.S. 672 (1970) (hereinafter *Tilton*). *Tilton* involved an establishment clause challenge to federal expenditures for classroom facilities at church-related colleges and universities. One question before the Court was whether the United States could subsidize university facilities that might be used for religious instruction, religious training, or worship. The Congressional action challenged in *Tilton* limited the use of the federally-subsidized buildings to secular purposes for the first twenty years after the buildings were completed. After that first twenty years, however, there would exist no enforceable restrictions on the use of the buildings. The Court found the potential for religious use of the federally-subsidized buildings to have the primary effect of advancing religion, and, thus, to violate the establishment clause:

> Under § 754(b)(2), therefore, a recipient institution's obligation not to use the facility for sectarian instruction or religious worship would appear to expire at the end of 20 years. We note, for example, that under § 718(b)(7)(C) (1964 ed., Supp. V), an institution applying for a federal grant is only required to provide assurances that the facility will not be used for sectarian instruction or religious worship "during at least the period of the Federal interest therein (as defined in section 754 of this title)."
>
> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. *If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.*
>
> *To this extent the Act therefore trespasses on the Religion Clauses.* The restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value.

Tilton, supra at 683 (emphasis added).

This Court finds the Supreme Court's clear holding in *Tilton* to control the question of whether university-owned buildings may be used for religious purposes. In this case, it is uncontradicted that plaintiffs seek to use state-owned buildings on a regular basis for the conduct of their religious worship services. Thus, the practice that plaintiffs request this Court to force upon the university is identical to the practice that the *Tilton* Court found to have a primary effect of advancing religion.

This Court does not read *Tilton* to apply only to church-related universities. The *Tilton* Court specifically noted that, "these [church-related univeristy] buildings are indistinquishable from a state university facility." *Tilton, supra* at 680.

In *Tilton,* the Court held that if a practice has the primary effect of advancing religion it violates the establishment clause. *Tilton, supra* at 683. In light of *Tilton,* this Court finds that a university policy permitting regular religious services in university-owned buildings would have the primary effect of advancing religion. This Court holds, therefore, that the university's present ban on religious services in its buildings is required by the establishment clause.

Plaintiffs rely on *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. Supr. 1975) (hereinafter *Keegan),* as support for their contention that UMKC could, without violating the establishment clause, permit plaintiffs to hold regular religious services in university-owned buildings. This Court has carefully considered the Supreme Court of Delaware's opinion in *Keegan* and finds that the outcome in that case is not supported by the controlling law. In *Keegan,* the Supreme Court of Delaware was faced with facts that are indistinguishable from the facts of this case. The plaintiffs in *Keegan* were a group of students who sought permission to hold regular worship services in the commons area of a university-owned dormitory. In defending its refusal to permit the religious services, the University of Delaware argued that to permit the religious services would be a violation of the establishment clause. The Supreme Court of Delaware rejected that argument. Citing *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), and Committee for *Public Education* v. *Nyquist,* 413 U.S. 756 (1973), the Supreme Court of Delaware found, without analysis, that a policy permitting the requested religious services, "would not have an effect that primarily advances religion, would not reflect a sectarian legislative purpose, and would not foster excessive government entanglement with religion." *Keegan, supra* at 16. Citing *Zorach* v. *Clauson,* 343

U.S. 306 (1952), and *Abington School District* v. *Schempp*, 374 U.S. 203 (1953), again without analysis, the *Keegan* Court went on to hold, "To allow religious worship groups the same rights and privileges attendant with the use of the commons room of the dormitory as are accorded other group activities would reflect a lawful accommodation." *Keegan, supra* at 16. Neither *Lemon* v. *Kurtzman, supra,* nor *Committee for Public Education* v. *Nyquist, supra,* stand for the proposition for which they were cited by the Supreme Court of Delaware. *Lemon* v. *Kurtzman, supra,* involved an establishment clause challenge to state aid to church-related elementary and secondary schools. The Supreme Court held that the challenged statutes violated the establishment clause. *Committee for Public Education* v. *Nyquist, supra,* involved an establishment clause challenge to three of the State of New York's programs for assistance to low income school-age children. As in *Lemon* v. *Kurtzman, supra,* the programs were held to be unconstitutional. Neither of those cases stand for the proposition that religious worship services may be conducted in state-owned buildings without violating the establishment clause of the first amendment. Likewise, neither *Zorach* v. *Clauson, supra,* nor *Abington School District* v. *Schempp, supra,* stand for the propositions for which they were cited. *Zorach* v. *Clauson, supra,* involved an establishment clause challenge to a State of New York program that permitted public school students to leave the school buildings, during regular school hours, to attend religious services. In holding that the program did not violate the establishment clause, the Court relied on the fact that no religious services were conducted in the public school buildings. That case must, therefore, be distinguished from this case where the question presented is whether religious services may be held in a state owned building. In *Abington School District* v. *Schempp, supra,* the Court held that a Pennsylvania law that required reading of the Bible in public schools violated the establishment clause. Neither case can be read to hold that religious groups may be accommodated by permitting them to hold their services in a state-owned

building. In addition, the Supreme Court of Delaware failed to discuss *Tilton, supra,* which is the sole Supreme Court opinion where the question of religious use of university buildings has been presented. This Court is convinced that the outcome in *Keegan* cannot be reconciled with the Supreme Court's opinion in *Tilton, supra.* Accordingly, this Court finds the Supreme Court of Delaware's opinion in *Keegan* of no value in deciding the establishment clause question that is before this Court.

Next, plaintiffs take the position that, even if the conduct of their religious services in university-owned buildings would violate the establishment clause, the university's ban on the religious services must still be struck down because it violates plaintiffs' rights to free exercise of their religion. The basis for this position is plaintiffs' argument that the Supreme Court has relegated the establishment clause to a position inferior to that of the free exercise clause. This Court finds that plaintiffs' position on this point is without merit. First, this Court is not convinced that plaintiffs' right to freely exercise their religion is infringed, in any way, by the university's ban on religious activities in university-owned buildings. In *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), the Supreme Court made clear that, to invoke the protection of the free exercise clause, the infringed practice must be "one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Wisconsin* v. *Yoder,* 406 U.S. 205, 216 (1972). The facts before this Court simply to not establish that the "practice" of holding religious services in a university-owned building is a matter of deep religious conviction to these plaintiffs. At most, the parties' stipulations support a finding that plaintiffs *prefer* having their religious services in a university-owned building to having the services in a building or home off-campus. In *Wisconsin* v. *Yoder, supra,* the Court specifically held that "matter[s] of personal preference" are not entitled to the protection of the religion clauses. *Wisconsin* v. *Yoder, supra,* at 216.

Second, even if plaintiffs had established that their free exercise rights were somehow infringed by the university's ban on religious services, this Court finds that, as argued by defendants, the State of Missouri's interest in maintaining a strict separation of church and state is a sufficiently compelling interest to overbalance plaintiffs' claims to free exercise of religion. There is no necessity for this Court to retrace Missouri's long history of strict separation of church and state. That history has been held to evidence a compelling interest in maintaining that separation:

> We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a "compelling state interest in the regulation of a subject within the State's constitutional power," within the standard enunciated in NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L. Ed.2d 405 (1963), and applied in *Sherbert*. That interest, in our judgment, satisfies any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States. We likewise find and conclude that Missouri's interest in that subject is within Missouri's constitutional power and that such interest may properly be described as an "interest of the highest order" within the meaning of *Yoder* and within the meaning of all the other various descriptive terms set forth in United States v. O'Brien above quoted.

Luetkemeyer v. *Kaufman*, 364 F. Supp. 376, 386 (W.D. Mo. 1973), *affirmed* 419 U.S. 888 (1974).

Third, this Court is unconvinced by plaintiffs' argument that the Supreme Court has made the establishment clause subordinate to the free exercise clause. In support of that argument, plaintiffs cite *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and

Wisconsin v. *Yoder,* 406 U.S. 205 (1972). After reviewing those two opinions, this Court disagrees with plaintiffs' reading of those case. In *Sherbert* v. *Verner, supra,* the Court specifically held that State accommodation of the Seventh-Day Adventist's beliefs did *not* violate the establishment clause. *Sherbert* v. *Verner, supra* at 409. The majority opinion in *Sherbert* v. *Verner, supra,* does not even include a discussion of the tension between the establishment clause and the free exercise clause. In *Wisconsin* v. *Yoder, supra,* the majority opinion does include a discussion of the interplay between the religion clauses:

> The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. by preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses.
>
> > "we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed." *Walz* v. *Tax Commission, supra,* at 672.

Wisconsin v. *Yoder, supra* at 220-221. This Court interprets that passage to mean that a mere *danger* of an establishment clause violation cannot serve as a justification for interference with free exercise rights. The Court makes clear that the proper course is one that both avoids infringement of free exercise rights and "avoid[s] any semblance of established religion." *Wisconsin* v. *Yoder, supra* at 221. The two cases relied upon by plaintiffs simply cannot be read to hold that the establishment clause is subordinate to the free exercise clause. The two religion clauses are aimed at separate evils. *Abington School District* v. *Schempp, supra.* The clauses must, therefore, be read together,

with neither clause subordinate to the other. *Walz* v. *Tax Commission,* 397 U.S. 64 (1970). Governmental activity may not exceed the boundaries of either clause. *Wisconsin* v. *Yoder,* 406 U.S. 205, 220 (1971). Since a policy permitting religious services in the university's buildings would violate the establishment clause, plaintiffs' request for this Court to order the university to adopt that policy will be denied.

Plaintiffs make three additional arguments that must be considered. First, plaintiffs argue that the university's regulations act as a prior restraint against religious speech. Plaintiffs do not explain this argument, but this Court feels compelled to address the issues that may be lurking in its shadows. This argument is not unlike the one made by plaintiffs in connection with their free exercise theory. Essentially, they argue that the establishment clause must yield to the freedom of speech clause of the first amendment. This Court is convinced that this argument has been rejected by the Supreme Court.

In *Abington School District* v. *Schempp, supra,* the Court was presented with an establishment clause challenge to daily Bible readings conducted by students and teachers in Pennsylvania's public schools. The Supreme Court upheld a lower court order that enjoined the Bible readings. There exists no doubt that students' and teachers' rights to freedom of speech are protected by the first and fourteenth amendments. *Tinker* v. *Des Moines School District,* 393 U.S. 503, 506 (1969). In *Abington School District* v. *Schempp, supra,* however, the Court did not even discuss the effect of its decision on the students' and teachers' free speech rights. That omission is explained by the Court's distinction between "secular intellectual liberties" and "religious activity." *Abington School District* v. *Schempp, supra* at 219. In short, speech with religious content cannot be treated the same as any other form of speech. To do so would make a nullity of both the establishment clause and the free exercise clause of the first amendment.

Next, plaintiffs argue that the university's policy of making the University Center (student union) available to student groups for all purposes except religious purposes denies plaintiffs equal protection of the laws. In support of that argument, plaintiffs cite *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953) (hereinafter *Fowler*). That case involved a city ordinance that was construed to prohibit a group of Jehovah's Witnesses from conducting religious services in a public park. That case must be distinguished from the one before this Court for two reasons. First, the parties in that case conceded that the ordinance in question had been construed to permit Catholics and Protestants to hold their religious services in the park. Thus, the application of the ordinance to Jehova's Witnesses resulted in discrimination against the Jehova's Witnesses as a religious group. There is, however, absolutely no evidence in this case that other religious groups at the university are treated more favorable than the plaintiffs in this action. Second, the *Fowler* case involved the use of a public park, not a public building. This Court is convinced that, for purposes of the religion clauses, a distinction must be drawn between public parks, sidewalks and streets on the one hand, and public buildings on the other. That distinction was recognized in *Soia* v. *New York,* 334 U.S. 558 (1948). The question before the Court in that case was whether a Jehovah's Witness could be barred from preaching over a loud speaker in a public park. The Court upheld the use of the loud speakers. In dissent, Justice Jackson took the position that the use of the public park for religious services violated the establishment clause of the first amendment. *Soia* v. *New York, supra* at 569-70. Justice Jackson reasoned that the Court's holding in *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), that the use of a public building for religious services violated the establishment clause, controlled the question of use of a public park for religious services. *Soia* v. *New York, supra* at 569-70. The majority of the Court rejected that position:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Soia v. *New York, supra* at 561 n. 2. That view has consistently been upheld by the federal courts. It was most recently applied to permit Pope John Paul II to conduct a public Mass on the Washington Mall in Washington, D.C. *O'Hair* v. *Andrus,* Case Number 79-2170 (D.C. Cir. 1979) (Slip Op. October 5, 1979). Thus, if the university's regulations were being applied to prohibit plaintiffs from conducting religious services on the grounds, sidewalks, or streets of the university, plaintiffs' equal protection argument would have some force. In this case, however, plaintiffs' complaint challenges only the denial of the use of university-owned buildings for religious services. As discussed above, since such use would violate the establishment clause, this Court declines to order the university to permit the use of its buildings for religious services.

Finally, plaintiffs argue that, since the university's regulations could be construed to prohibit activities such as classroom discussion of theology, invocations at university functions, and private discussions between individuals, the regulations must, therefore, be struck down as vague and overbroad. This Court is unconvinced by that argument. First, the university's regulation bars only "religious worship or religious teaching." Those

phrases are virtually identical to the language in the Congressional enactment upheld in *Tilton* v. *Richardson, supra.* Second, plaintiffs candidly admit that the meetings they wish to hold in the university's buildings include regular religious worship services. The university's regulations have been appropriately interpreted to deny the use of university buildings for those services. There is absolutely no suggestion in the parties' pleadings or stipulations that the regulations have ever been used to bar activities protected by the first amendment. More importantly, plaintiffs have failed to present any evidence that the exercise of their first amendment rights have been chilled, in any way, by the existence of the university's regulations. The regulations include no threat of punishment, *Thornhill* v. *Alabama,* 310 U.S. 88, 101-102 (1940), nor, as far as this Court knows, have they ever been applied to activities other than regular religious worship services. On these facts, therefore, this Court finds plaintiffs' vagueness argument to be without merit.

For the reasons set forth above, it is

ORDERED that defendants' motion for summary judgment, filed May 16, 1978, be, and hereby is, granted; and it is

ORDERED that plaintiffs' motion for summary judgment, filed May 26, 1978, be, and hereby is, denied.

/s/ Wiliam R. Collinson
District Judge

Dated: December 11, 1979.